In the Supreme Court

of the

United States

October Term 1972

No. 71-1442

ROLAND V. COLGROVE, *Petitioner,*

against

HONORABLE JAMES F. BATTIN,
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF MONTANA,
BILLINGS, DIVISION, *Respondent.*

ROLAND V. COLGROVE, *Plaintiff,*

vs. Civil No. 783

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, *Defendant.*

Brief of Respondent Requesting an Order Affirming Forthwith on the Merits the Opinion of the Ninth Circuit Court of Appeals or, in the Alternative, Denying the Petition for Writ of Certiorari.

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QUESTION PRESENTED

Effective *September 1, 1971,* the District Court of the United States for the District of Montana promulgated its district court *Rule 13(d)(1)* prescribing a jury of six persons for the trial of civil cases. Petitioner requested a mandate from the Ninth Circuit Court declaring *Rule 13(d)(1)* void and invalid, and ordering the District Court to try his civil, damage action before a jury of twelve persons. The Ninth Circuit Court in a written opinion, denied the application, and petitioner has now applied to this court for a writ of Certiorari.

Respondent requests this court to summarily affirm on the merits the opinion of the Ninth Circuit Court on the briefs and without the necessity of oral argument. As an alternative, we request that the petition for writ of certiorari be denied.

STATEMENT OF POSITION

There is no constitutional language, no congressional enactment, no rule of Federal Civil Procedure, and no rule of the Supreme Court of the United States, requiring that a jury for a civil, legal action shall consist of twelve persons, nor preventing nor precluding a district court from promulgating a rule of procedure requiring a jury of six persons. Petitioner has failed to place the constitutional language involved in its proper perspective in light of the historical background in which the first seven articles of the Constitution were promulgated at the first Constitutional Convention, and

in light of the historical background in which Amendments 6 and 7 were promulgated by the first Congress.

Furthermore, petitioner has failed to give proper or adequate consideration to the language of those decisions of the Supreme Court of the United States which have construed the scope of the Seventh Amendment in other areas.

Finally, when *Williams v. State of Florida, June 22, 1970, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446,* is placed in its proper perspective with the constitutional language, its historical background, and other decisions of this United States Supreme Court, it is manifestly clear that the Montana United States District Court *Rule 13(d)(1)* is a valid and subsisting rule of procedure, and that the Ninth Circuit Court should be affirmed.

LANGUAGE OF OUR UNITED STATES CONSTITUTION AND ITS HISTORICAL BACKGROUND

We do not have available locally the debates of the original constitutional convention. We do have, however, the writings of numerous historians and, in particular, the Federalist Papers published by Alexander Hamilton. All historians agree that one of the burning desires of all delegates was the protection of the personal liberty of all citizens by requiring a jury trial in all criminal cases. Hamilton's Federalist Paper 83, published *May 28, 1788,* confirms the other his-

torians that we have read, that the provision for trial by jury in criminal cases was considered a burning necessity, and that it was also considered desirable to have trial by jury in civil cases as an excellent method of determining questions of property under proper regulation (Lodge's Federalist, page 521). The great difference in jury practice among the several states made promulgation of a proviso that was satisfactory to all concerned an extremely difficult matter. We understand that there was a proposal made by Pennsylvania that "trial by jury shall be as heretofore"; and a proposal by Massachusetts for trial by jury in actions at common law "if the parties requested it"; and that both were defeated. We also understand that when the Committee on Style submitted its final draft to the convention on *September 12, 1787,* two modifications were then proposed, one of which was a specific provision for jury trials in civil cases. It was neither accepted nor rejected, but was returned to the Committee on Style to provide such a clause for consideration. We likewise understand from the historians that the failure to include any proviso thereafter in the original seven articles of the Constitution was not because of any disagreement concerning its advisibility, but because (1) the delegates were then ready to go home; (2) the difficulities in drafting a general rule that would satisfy all states because of the variety of court practices in the different states; (3) there was some fear among convention leaders

that prolonged and protracted dispute and debate over the issue might very well devastate the agreement that had already been arrived at; (4) the delegates had fulfilled the burning necessity for proserving the right of jury trial in all criminal cases; and (5) last, but not least, the responsible delegates felt that there was no danger in leaving the drafting and determination with respect to civil cases for Congress to promulgate in the future under the powers vested in Congress in *Section 8, Article 1,* along with the judicial powers vested in such inferior courts as might be created by Congress from time to time as provided in *Article III. Article I(8)* provides that Congress shall have power:

> "To constitute tribunals inferior to the Supreme Court. *(Clause 9)*

Article III, paragraph 1, vests judicial power in the one Supreme Court of the United States:

> "and such inferior courts as the Congress may from time to time ordain and establish."

Article III likewise expressly provides that "the trial of all crimes, except in cases of impeachment, shall be by jury; * * *".

We find additionally significant to our problem the necessary and proper clause of *Section 8, Article I,* which vests power in Congress:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution and the government of the United States, or in any department or officer thereof." *(Clause 18)*

None of the foregoing language of the original seven articles of the original Constitution has ever been altered, changed, nor disturbed in any manner.

Paper 83 of the Federalist by Alexander Hamilton was published *May 28, 1788, b*etween adjournment of the original convention and the convening of the first Congress. He pointed out that the most severe criticism of the first seven articles of the original Constitution that he heard in New York, and perhaps in all the other states, was "relative to the want of the constitutional provision for the trial by jury in civil cases." Many persons feared that by the failure of the Constitution to include such a provision, it was abolished. Hamilton tried to allay such fears in *Paper 83.*

> "A power to constitute courts is a power to prescribe the mode of trail; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. * * *" *(Pp. 518, Lodge, Pp. 357, Beard)*

We add in addition to the power granted to constitute the courts, the supplementary power vested in Congress by the "Necessary and Proper" *Clause 18 of Section 8 of Article I,* coupled with the express vesting of judicial power by *Article III* in all cases in law or equity in such inferior courts as the *Congress* may from time to time ordain and establish. Hamilton also stated:

> "The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually

happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails. * * * It is conceded by all reasonable men that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these states as in Great Britain, afford a strong presumption that its former extent has been found inconvenient, and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutary point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature." *(Lodge, Pp. 531-532)*

It seems historically clear that the delegates desired to preserve the right of trial by jury in both civil and criminal cases, but a plan that would define the precise consistency of juries that would satisfy all delegates, and all states, could not be drawn up. For that reason, the Constitution required that the right of trial by jury be preserved, but the plan for the consistency of juries was left to the Congress to legislate from time to time as needs might require.

The omission of any language in Amendments 6 and 7 adopted by the first Congress in *1789* which would spell out or prescribe the number of jurors carries great significance when viewed in the light of that historical background.

"AMENDMENT 6

In all criminal prosecutions the accused shall enjoy the right to a speedy annd public trial, by an impartial jury of the state and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT 7

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

SIGNIFICANT CASES WHICH HAVE CONSTRUED THE SEVENTH AMENDMENT

The language of Supreme Court decisions which have construed the scope of the *Seventh Amendment* in other areas is significant.

In an opinion by *Justice Brandeis* in *Ex Parte Peterson, 253 U.S. 300 40 S.Ct. 543, 64 L.Ed. 919,* it was said with respect to the *Seventh Amendment:*

> "The command of the Seventh Amendment that 'the right of trial by jury shall be preserved; does not require that old forms of practice and procedure be retained (citing cases * * *). New devices may be used to adapt the ancient institution (jury trial) to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that ultimate determination of issues of fact by the jury be not interfered with." *(309-310, U.S.; 546, S.Ct.; 923-924, L.Ed.)*

In *Galloway v. United States, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458,* the Ninth Circuit Court had affirmed the granting of a motion for directed verdict. With respect to such procedure under the *Seventh Amendment* the Supreme Court said in part:

> "The (Seventh) Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial, according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were 'the rules of the common law' then prevalent, including the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process already had resulted in widely divergent common law rules on procedural matters among the states, and between them and England. * * *" *(390-392, U.S.; 1087-1088, S.Ct.; 1471, L.Ed.)*

In *Byrne v. Matczak, 3rd C.C., 1958, 254 F2d 525, cert. den., 358 U.S. 816, 79 S.Ct. 24, 3 L.Ed.2d 58,* a District Judge permitted a trial jury to disperse during deliberations, go to their homes, and return to their deliberations after a night of rest. It was argued that traditionally at common law the trial jury had to be held together intact while deliberating, and the failure to do so violated the right of trial by jury as guaranteed by the *Seventh Amendment.* In rejecting such contention, the court said:

> "True, the allowance of a dispersal is contrary to the old common law. And there is, in Dimick v.

Schiedt, 1935, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603, strong language to the effect that the Seventh Amendment perpetuated jury procedures as they existed in 1791. However prior to Dimick v. Schiedt, the entire development of this area was to the effect that the constitutional conception of jury trial is not inflexible in all details, so long as the essential elements of the institution are preserved. E.g., Gasoline Products Co. v. Champlin Refining Co., 1931, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188; Ex parte Peterson, 1920 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919, and see generally Scott, Trial by Jury and the Reform of Civil Procedure, 1918, 31 Harv.L.Rev. 669. And since Dimick v. Schiedt, supra, this older line of reasoning has been reaffirmed in Galloway v. United States, 1943, 319 U.S. 372, 388-386, 63 S.Ct. 1077, 87 L.Ed. 1458. In this view, fair new procedures which tend to facilitate proper fact finding are allowable although not traditional." *(528-529)*

In *Hànna v. Plumber, Massachusetts, 1965, 380 U.S. 460 at 472, 85 S.Ct. 1136 at 1144, 14 L.Ed. 2d 8,* the court said while construing the validity of service of process under federal rule which apparently was fatally defective under state court provisions:

> "For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing practice and pleading in those courts, which in turn includes power to regulate matters which, though falling within uncertain area between substance and procedure, are rationally capable of classification as either."

The phrase "common law" as first used in the *Seventh Amendment* was held to simply preserve the right to a trial by jury in actions involving legal rights

as distinct from equitable rights *(Ross v. Bernhard, 1970,, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729).*

The second usage in the amendment of the phrase "common law" simply assured that no judge or judges shall substitute their decisions on fact issues in the place and stead of the fact findings of a jury *(Baltimore and Carolina Line Inc. v. Redman, 1935, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636).*

Law Week's Summary & Analysis of Current Law, May 2, 1972, states:

> "Six-Member Civil Jury
> Upheld By Fifth Circuit
>
> Neither the Seventh Amendment nor Fed.R. Civ.P. 48, the U.S. Court of Appeals for the Fifth Circuit rules, prevents a federal district court from limiting civil juries to six members (Cooley v. Strickland Transportation Co., 4/21/72)
>
> The court of appeals finds that Williams v. Florida 399 U.S. 78, 38 LW 4557 (1970), answers the constitutional arguments leveled against the six-member civil jury. In Williams, the Supreme Court held that an individual's Sixth Amendment right, as applied to the states through the Fourteenth, were not violated by Florida's decision to provide a jury of six. No one, the court observes, contends that the function of a civil jury is more important than that of a criminal jury. Since changes in the traditional jury do not offend the concept of 'trial by jury' within the context of a criminal case, the same changes will not offend that concept within the context of a civil case.
>
> Nor does Rule 48 demand a contrary result. The rule provides that 'the parties may stipulate that the jury shall consist of any number less than 12 but that a verdict or finding of a stated majority

> of the jurors shall be taken as the verdict or finding of the jury'. Although it is argued that absent a stipulation to reduce the size of the jury, the rule guarantees a 12-member jury, the court finds that the argument is misplaced. The drafters of the rules knew how to use express language to guarantee a 12-member jury, as evidence by Fed.R.Crim.P. 23(b). Furthermore, the court notes, Rule 48 deals only with a stipulation by 'the parties'. It does not purport to prevent court rules that provide for civil juries of reduced size. (Page 2718)"

We do not yet have the Federal Reporter citation.

When the language of the *Seventh Amendment* is considered in light of the historical background, in light of the language of the foregoing decisions of the Supreme Court construing the scope of the amendment in other areas, in light of the two opinions of the Fifth and Ninth Circuit Courts of Appeal, and in light of the decision in *Williams v. State of Florida* when considered in its proper perspective, the conclusions drawn by petitioner are simply not warranted.

PLACING WILLIAM-STATE OF FLORIDA IN ITS PROPER PERSPECTIVE

Prior to the decision of the Supreme Court of the United States in *Williams vs. State of Florida, June 22, 1970, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446,* no case presented the precise, specific issue of whether or not the scope of the right of trial by jury guaranteed in criminal cases by the *Sixth Amendment,* or in civil cases by the *Seventh Amendment,* required the number of jurors to be fixed precisely at twelve. We find the *Wil-*

liams case to be of particular significance since it did involve the right of trial by jury in a criminal case. Certainly, if the language of the Constitution cannot be construed as requiring any particular number of jurors in a criminal case, it is difficult to see how it can be so construed to prescribe the number of jurors in a civil case.

We also feel that case decisions handed down shortly before *Williams-State of Florida* assist in placing that case in its proper perspective.

In *Duncan v. State of Louisiana, May 20, 1968, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491; reh. den. 392 U.S. 947, 88A S.Ct. 2270, 20 L.Ed.2d 1412,* a dissenting opinion by *Justice Harlan,* joined by *Justice Stewart,* stated in part:

> "• • • If the problem is to discover and articulate the rules of fundamental fairness in criminal proceedings, there is no reason to assume that the whole body of rules developed in this Court constituting Sixth Amendment jury trial must be regarded as a unit. The requirement of trial by jury in federal criminal cases has given rise to numerous subsidiary questions respecting the exact scope and content of the right. It surely cannot be that every answer the Court has given, or will give, to such a question is attributable to the Founders; or even that every rule announced carries equal conviction of this Court; still less can it be that every such subprinciple is equally fundamental to ordered liberty.
>
> Examples abound. I should suppose it obviously fundamental to fairness that a 'jury' means an 'impartial *jury'. I should think it equally obvious that the rule, imposed long ago in the federal courts, that 'jury' means 'jury of exactly twelve', is not fundamental to anything: there is no significance except

to mystics in the number 12. Again, trial by jury has been held to require a unanimous verdict of jurors in the federal courts, although unanimity has not been found essential to liberty in Britain, where the requirement has been abandoned." *(181, U.S.; 514, L.Ed.; 1465, S.Ct.)*

The foregoing language of *Justice Harlan* was partially utilized by the majority in *Williams-State of Florida:*

"We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to ef- the purposes of the jury system and wholly without significance 'except to mystics'. Duncan v. Louisiana, supra, at 182, 20 L Ed 2d at 514 (Harlan, J., dissenting)." *(102, U.S.; 461, L.Ed.2d; 1907, S.Ct.)*

On *May 20, 1968,* when *Duncan-State of Louisiana* was handed down, the court likewise rendered its decision in *Bloom v. State of Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed. 2d 522,* in which the Supreme Court of the United States held that under the *Sixth Amendment* states are compelled to afford the right of a trial by jury in any prosecution for serious criminal contempt. In a concurring opinion, *Justice Fortas* stated:

"But although I agree with the decision of the Court, I cannot agree with the implication, see ante, 20 L Ed 2d at 501, n.30, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that 'due process' requires that the States accord the right of jury trial for all but petty offense, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts. I see no reason whatever, for example to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States.

We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law —and that they are not obligatory on the States." *(213, U.S.; 535, L.Ed.2d; 1451, S.Ct.)*

We shall not belabor *William v. State of Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446*, which held:

"* * * The question in this case then is whether the constitutional guarantee of a trial by 'jury' necessarily requires trial by exactly 12 persons, rather than some lesser number—in this case six. We hold that the 12 man panel is not a necessary ingredient of 'trial by jury', and that respondent's refusal to impanel more than six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the states through the Fourteenth." *(86, U.S.; 452, L.Ed.2d; 1898, S.Ct.)*

When *Williams-State of Florida*, considered in perspective, upheld the constitutional validity of a jury of six persons in a criminal case, then the validity of a district court rule requiring six jurors in civil cases should be even more clear.

CONCLUSION

Historically, the framers of our Constitution were vitally concerned with protecting and preserving personal liberty through a requirement of a trial by a fair and impartial jury. It was likewise considered desirable in civil cases. Because of the great differences between court practices in the various states, the designing of a detailed plan that would satisfy all was extremely difficult. The intention to preserve the ancient distinc-

tions in civil cases between law and equity is clear. Otherwise, the right of trial by jury was preserved in both criminal and civil actions through general language substantially identical for both classes. The Constitution has never prescribed nor required the number of jurors in any case. Instead, the Constitution empowered Congress to create the inferior courts, and to regulate their conduct through the Necessary and Proper Clause, and thereby to make any changes from time to time as changing conditions might require. The Supreme Court by criminal procedural rules requires a twelve-man jury in criminal cases, but there is no rule promulgated by the Supreme Court which spells out or requires a twelve-man jury in civil cases. All that is required by *38(a) F.R.C.P.* is the right to a trial by jury in civil cases "as declared by the Seventh Amendment", and nothing more. District courts have, of course, been vested with rule-making power where such does not contradict or conflict with statutes or other Supreme Court rule *(83 F.R.C.P.)*. The rule promulgated by the United States District Court for the District of Montana prescribing the number of jurors for the trial of civil cases was authorized under *Rule 83*, and is a valid and subsisting rule.

We respectfully submit in view of the importance and simplicity of the only question presented that the opinion of the Ninth Circuit Court be affirmed forth-

with, and without the necessity of oral argument. In the interest of the earliest possible decision on the merits, we request that this brief of respondent be accepted under *Rule 40* as a brief on the merits. At an alternative, we request that the petition for writ of certiorari be denied.

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